Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES L. BOWLEY,

Petitioner,

v.

CITY OF UNIONTOWN POLICE DEPARTMENT; HERALD-STANDARD; CITY OF UNIONTOWN, a municipal corporation; OFFICER FRED BALSLEY, individually and in his capacity as a police officer,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. **Whether the lower courts erred in granting a Motion to Dismiss on the grounds that a newspaper has a First Amendment right to publish a juvenile arrest record, in contravention of a narrowly crafted Pennsylvania statute expressly declaring such information confidential?**

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OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals appears at Appendix p2A and was reported as James L. Bowley v. City of Uniontown Police Department, et al, 404 F.3d 783, 33 Media L. Rep. 1642 (3d Cir. 2005). The Report and Recommendation of the United States District Court for the Western District of Pennsylvania is not reported and appears at Appendix p14A.

STATEMENT OF JURISDICTION

Petitioners seek this Court's review of the judgment of the United States Court of Appeals for the Third Circuit entered April 26, 2005. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 Pa. C.S. §6308(b)(1): **The contents of law enforcement records and files concerning a child shall not be disclosed to the public** except if the child is 14 or more years of age at the time of the alleged conduct and if any of the following apply:

(I) The child has been adjudicated delinquent by a court as a result of an act or acts which include the elements of rape, kidnapping, murder, robbery, arson, burglary, violation of section 13(a)(30) of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, or other act involving the use of or threat of serious bodily harm.

(ii) A petition alleging delinquency has been filed by a law enforcement agency alleging that the child has committed an act or acts which include the elements of rape, kidnapping, murder, robbery, arson, burglary, violation of section 13(a)(30) of The Controlled Substance, Drug, Device and Cosmetic Act, or other act involving the use of or threat of serious bodily harm and the child previously has been adjudicated delinquent by a court as a result of an act or acts which included the elements of one of such crimes.

42 Pa. C.S. §6308(b)(1) (footnote omitted). (emphasis added)

AMENDMENT I: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Plaintiff commenced this action on November 28, 2001, by filing a Praecipe for Writ of Summons in the Court of Common Pleas of Fayette County, Pennsylvania. A Complaint was then filed on July 7, 2003. The action was originally initiated in the Court of Common Pleas of Fayette County . The Complaint set forth 3 (three) counts which included: I-Breach of Confidentiality; II-Invasion of Privacy; and, III-Civil Rights Violations. As the Complaint set forth a claim for federal constitutional and civil rights violations and sought relief pursuant to 42 U.S.C. §1983, the matter was removed to The United States District Court for the Western District of Pennsylvania.

On or about November 28, 2000, Defendant Herald Standard ran an article in their newspaper stating that Plaintiff had been arrested on November 26, 2000 for allegedly raping a 7 year old girl he had been babysitting. The story was based upon information the newspaper had received from the Defendant Police Department, and in particular, from Defendant Balsley.

Under Pennsylvania law, information concerning alleged criminal activities and in particular, the contents of law enforcement records and files, concerning a child shall not be disclosed to the public unless the child is over 14 and has been adjudicated delinquent by a court for certain specified acts. See 42 Pa. C.S. §6308. At the time of the publication, Plaintiff Bowley had not been adjudicated delinquent, and he has never been adjudicated delinquent for the acts specified by the statute. Defendants had a duty under Pennsylvania law to keep information concerning allegations of criminal acts of a minor child such as Plaintiff completely confidential. By disclosing that plaintiff had arrested for allegedly committing a serious, highly prejudicial and odious act to the public to and in a public newspaper, Defendants

breached this obligation, particularly since both the name of the plaintiff and his age were disclosed in the newspaper article.

The Complaint alleged (Count I) that Defendant Herald Standard breached the plaintiff's confidentiality by willfully and unlawfully, or alternatively, unnecessarily, recklessly and in conscious disregard of the plaintiff's rights, publishing an article in its newspaper telling the public the name of plaintiff and his alleged criminal act. The person or persons to whom the information was divulged, the public, had no legitimate interest in such information and hence the divulging of the information was not privileged.

On the basis of these same facts (Count II) an action of invasion of privacy was also alleged against the newspaper.

(Count III) alleged that the municipal defendants and Officer Balsley violated plaintiff's civil rights by publishing the information and by pursuing a policy, custom or procedure of failing to educate, train or otherwise inform police officers of the basic requirements concerning confidentiality of juvenile records.

The complaint alleged that plaintiff was damaged from the breach of confidentiality and the invasion of privacy.

The Honorable Robert C. Mitchell, Magistrate Judge, issued a Report and Recommendation dated September 24, 2003, granting a Motion to Dismiss filed on behalf of defendant Uniontown Herald-Standard which was confirmed by the District Court. An appeal was taken to the Third Circuit Court of Appeals from a Stipulation for Dismissal, as ordered by Honorable Joy Flowers Conti dated April 13, 2004, which served to make final and appealable her Order dated December 4, 2003, which adopted the opinion of Honorable Robert C. Mitchell. Following oral

argument, the panel, consisting of Circuit Judges Nygaard, McKee and Rendell, affirmed the District Court's grant of the Herald Standard's Motion to Dismiss.

The facts of the case follow:

On or about November 28, 2000, Defendant Herald Standard ran an article in their newspaper stating that Plaintiff had been arrested on November 26, 2000 for allegedly raping a 7 (seven) year old girl he had been babysitting. The story was based upon information the newspaper had received from the Defendant Police Department, and in particular, from Defendant Balsley.

The article stated as follows:

> City police arrested James Landon Bowley, 15, of Farmington Sunday on charges he allegedly raped a 7-year-old girl he was babysitting at her Uniontown home Friday evening.
>
> According to police, the girl's mother took her daughter to Uniontown Hospital after the girl complained of injury and bleeding Sunday afternoon.
>
> Bowley turned himself in to police Sunday at 5:45 p.m. and was charged with two counts of rape and one count each of indecent assault, involuntary deviate sexual intercourse and indecent exposure. Charges against Bowley were filed at the Connellsville Juvenile Detention Facility, where he is being held, police said.

Plaintiff James L. Bowley was born on November 17, 1985.

Under Pennsylvania law, information concerning alleged criminal activities and in particular, the contents of law enforcement records and files, concerning a child shall not be disclosed to the public unless the child is over 14 (fourteen) and has been adjudicated delinquent by a court for certain specified acts. See 42 Pa. C.S. §6308. Defendants had a duty under Pennsylvania law to keep information concerning allegations of criminal acts of a minor child such as Plaintiff completely confidential. By disclosing that Plaintiff had been arrested for allegedly committing a serious, highly prejudicial and odious act to the public and in a public newspaper, Defendants breached this obligation, particularly since both the name of the Plaintiff and his age were disclosed in the newspaper article.

As a result of Defendants' actions, Plaintiff suffered extreme humiliation, mental anguish, embarrassment, fear of social ostracism, and other severe mental distress. The injuries caused the Plaintiff great pain and suffering, preventing him from attending his usual duties and activities.

Since the matter was decided on the basis of the defendant newspaper's Rule 12(b)(6) motion, the above facts are taken directly from plaintiff's complaint at p30-36A.

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari to decide whether a newspaper has a First Amendment right to publish a juvenile arrest record, in contravention of a narrowly crafted Pennsylvania statute expressly declaring such information confidential.

The appellate court has erroneously assumed that the United States Supreme Court would not recognize that a narrowly crafted statute exists in Pennsylvania, designed to protect juvenile identities under certain circumstances, not containing criminal sanctions and applying without discrimination to all publishing parties would not satisfy constitutional muster.

When a newspaper and/or media venue is protected from liability despite an alleged violation of 42 Pa. C.S. §6308 on the basis of the First Amendment, an unhealthy environment is created whereby there is virtually no enforcement of vital civil rights which are in place for the protection of anonymity of juvenile offenders. The views taken by the Third Circuit serves to create such an environment.

The District Court and Third Circuit have determined that Defendant newspaper is protected from liability despite an alleged violation of 42 Pa. C.S. §6308 on the basis of the First Amendment. The District Court held that state action to punish the publication of truthful information seldom can satisfy constitutional standards. The Third Circuit, in its Opinion by Circuit Judge Nygaard, agreed that the First Amendment provides the Defendant Newspaper Herald Standard with a shield from liability.

To an important extent, the resolution of this issue depends

upon a proper reading of the United States Supreme Court's opinion in Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979) which the district court relied heavily upon. In that case, the majority expressly made a narrow holding:

> Our holding in this case is narrow. There is no issue before us of unlawful press access to confidential judicial proceedings, see *Cox Broadcasting Corp. v. Cohn*, 420 U.S., at 496 n. 26, 95 S.Ct. at 1046, n. 26; there is no issue here of privacy or prejudicial pretrial publicity. At issue is simply the power of the state to punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper. The asserted state interest cannot justify the state's imposition of criminal sanctions on this type of publication. (emphasis added)

Id., at 105-106. Justice Rehnquist, in a concurring opinion, identified the interest as follows:

> ... In my view, a State's interest in preserving the anonymity of its juvenile offenders--an interest that I consider to be, in the words of the Court, of the "highest order"--far outweighs any minimal interference with freedom of the press that a ban on publication of the youths' names entails. (emphasis added)

Id. at 107. The majority opinion offers support for Rehnquist's interpretation of the "high magnitude" of the juvenile interest with the following words:

> The magnitude of the State's interest is not sufficient to justify application of a criminal penalty to respondents. Moreover, the statute's approach does not satisfy constitutional requirements. The statute does not

> restrict the electronic media or any form of publication, except "newspapers," from printing the names of youths charged in a juvenile proceeding. In this very case, three radio stations announced the alleged assailant's name before the Daily Mail decided to publish it. Thus, even assuming the statute served a state interest of the highest order, it does not accomplish its stated purpose.

Id at 104-105.

As Justice Rehnquist eloquently reminded us in his concurring opinion, consistent with the majority opinion, the state's interest in maintaining confidentiality for juvenile offenders is an interest of the highest order:

> It is a hallmark of our juvenile justice system in the United States that virtually from its inception at the end of the last century its proceedings have been conducted outside of the public's full gaze and the youths brought before our juvenile courts have been shielded from publicity. See H. Lou, Juvenile Courts in the United States 131-133 (1927); Geis, Publicity and Juvenile Court Proceedings, 30 Rocky Mt.L.Rev. 101, 102, 116 (1958). This insistence on confidentiality was born of a tender concern for the welfare of the child, to hide his youthful errors and "bury them in the graveyard of the forgotten past." In re Gault, 387 U.S. 1, 24-25, 87 S.Ct. 1428, 1442, 18 L.Ed.2d 527 (1967). The prohibition of publication of a juvenile's name is designed to protect the young person from the stigma of his misconduct and is rooted in the principle that a court concerned with juvenile affairs serves as a rehabilitative and protective agency of the State. National Advisory Committee on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention, Standard

> 5.13, pp. 224-225; see Davis v. Alaska, 415 U.S. 308, 319, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974); Kent v. United States, 383 U.S. 541, 554-555, 86 S.Ct. 1045, 1053-1054, 16 L.Ed.2d 84 (1966). Publication of the names of juvenile offenders may seriously impair the rehabilitative goals of the juvenile justice system and handicap the youths' prospects for adjustment in society and acceptance by the public. E. Eldefonso, Law Enforcement and the Youthful Offender 166 (3d ed. 1978). This exposure brings undue embarrassment to the families of youthful offenders and may cause the juvenile to lose employment opportunities or provide the hardcore delinquent the kind of attention he seeks, therefore encouraging him to commit further anti-social acts. Davis v. Alaska, supra, 415 U.S. at 319, 94 S.Ct. at 1111. Such publicity also renders nugatory States' expungement laws, for a potential employer or any other person can retrieve the information the States seek to "bury" simply by visiting the morgue of the local newspaper. The resultant widespread dissemination of a juvenile offender's name, there may defeat the beneficent rehabilitative purposes of a State's juvenile court system.

Id. 99 S.Ct. at 2673.

This failure to recognize that the interest is of the highest order, together with a much more narrowly crafted Pennsylvania statute, is responsible in part for the lower court's error. The lower courts also rely on Bartnicki v. Vopper, 532 U.S. 514 (2001) which involved the release of private cell phone conversations. Bartnicki is of no help to the defendant in this case because the state interest in support of the confidentiality is of a much higher order. Wiretap statutes do attempt to protect individual privacy. However, as noted by Justice Rehnquist and implied by the majority in Daily Mail, infra, the confidentiality surrounding the identity of a juvenile

offender is in fact a state interest of the "highest order." Bartnicki specifically holds open the possibility of sanction even if the newspaper lawfully obtains truthful information about a matter of public significance when the state can demonstrate need of the highest order. 532 U.S. at 527, 528.

No case cited by the defendant newspaper or lower courts go as far as the holding in this case. This ruling utterly destroys the possibility of privacy for juvenile records. While the lower courts permitted this case to proceed against the police defendants (which was ultimately settled), the real damage to an individual is done by the newspaper or media defendants with its far-ranging publication of the confidential material. In effect, the lower court declares a carefully drafted and narrowly confined statutory confidential protection for first offender juvenile arrest records, as contrary to the First Amendment without controlling precedent. Should their ruling stand, it is impossible to see what even minimal protections for juveniles will be given effect.

To say that the police can be sued is of little solace, since the damage is done by the ultimate publication. Further, the relationship between police document leaks and news reporters are historically close and symbiotic, as the police information feed the media machine. This circumstance is the precise opposite of "narrowly tailored" liability exception, since the main damages are beyond the reach of the ability of a juvenile plaintiff to recoup.

The lower courts also erred in dismissing Count II, alleging invasion of privacy. In so finding the court, without justification, has overruled the Pennsylvania legislature's determination that such juvenile arrest matters are confidential; and, hence, expressly not a matter of general public concern. About a constitutional objection, the lower court has no basis to overrule the state legislative judgment. The ruling represents an unjustified intrusion

by the courts into a rational and supportable legislative judgment.

Media defendants cause the most far-ranging damages to juvenile privacy rights when they ignore juvenile privacy statutes. There is no valid legal justification to exempt them from the reach of a private civil action, in light of the high order of the nature of the interest to be protected.

In essence, the lower courts determined that a critical element of the invasion of privacy count, that the published information not be a matter of public concern, was not met as a matter of law. They reasoned that an allegation that a juvenile had committed a rape legitimately belonged in the public domain.

This determination is fundamentally flawed because it has elevated the court's opinion above that of the state legislature on an issue of state law. More particularly, by the enactment of 42 Pa. C.S. §6308, the state legislature has declared that under certain circumstances, juvenile arrest records are not legitimate matters of public concern. Essentially, the statute permits publication of charges and allegations for serious offenses if the juvenile has previously been convicted of a serious matter. Additionally, the statute permits publication of the first time convictions of serious offenders. However, first time arrests are confidential.

The lower court's opinion cites no legal authority for the proposition that an activist court has the right to overrule the legislature on a matter of acknowledged state policy. Since the District Court predicated its finding on the assumption that a court could declare a matter of public concern, when the legislature has declared the matter to be confidential, it has misapprehended the appropriate respective roles of the courts and the legislature. The legislation is unambiguous and requires no interpretation. The lower court has cited no constitutional infirmity regarding the

statute concerning this cause of action. Counsel is unaware of any case that has overturned the constitutionality of a statute so narrowly drawn.

All parties agree that Pennsylvania recognizes a tort for invasion of privacy. Pennsylvania also has adopted the Restatement 2nd of Torts §652D, Publicity Given to Private Life, as the legal foundation for the tort. Harris by Harris v. Easton Publishing Co., 483 A.2d 1377 (Pa.Super.1984).

Defendant newspaper relied heavily upon an opinion by the District Court in Morgan v. Celender, 780 F.Supp. 307 (W.D.Pa. 1992) in support of their motion to dismiss. However, a review of that case reveals that it is premised upon a very different factual pattern and associated privacy interest. In that case, the alleged perpetrator of the sexual assault subject to the criminal charges was a chief of police. The chief had allegedly assaulted his own child. The child and its mother had voluntarily provided an interview to the media defendant. The district court held that the tort for the invasion of privacy was not established because the criminal charges against the adult police chief was a legitimate matter of public concern.

Clearly, a criminal matter against a police chief defendant, without question, would be a matter of legitimate public concern. Further, the granting of an interview to a reporter opens the door to the possibility that matters discussed will make its way into the newspaper. Additionally §652D of the Restatement 2nd of Torts further suggests that there would be no invasion of privacy under these circumstances. Comment i under §652D provides as follows:

> i. *Members of family.* Legitimate public interest in one who has become a public figure, whether voluntarily or

> involuntarily, is not necessarily limited to the individual himself. It may, to some reasonable extent, include members of his family or even others who have been closely associated with him, although there is nothing else about them to attract public attention.

In contradistinction to Morgan, the instant case is not an item of legitimate public concern. The underlying case concerns a juvenile defendant under circumstances where his privacy is to be protected and in no way involves a public figure. As noted by Justice Rehnquist, there are numerous policy reasons which support that the privacy interest here of the juvenile defendant is of the highest order.[1] Additionally, a Supreme Court decision has specifically held, in the context of a freedom of information request by a media party, that there was a reasonable expectation of privacy in a government-maintained rap sheet in U. S. Department of Justice v. Reporters Committee, 109 S.Ct. 1468, 1485 (1989). The court held as follows:

> .... Accordingly, we hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is "unwarranted."

The Restatement further supports the idea that confidential records support a cause of action for an invasion of privacy. In material part, comment b to §652D provides as follows:

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[1] This rationale also distinguishes Jenkins v. Bolla, 600 A.2d 1293 (Pa.Super. 1992) which concerned a record of conviction for sex related crimes by the operator of a boarding home.

> .... On the other hand, if the record is one not open to public inspection, as in the case of income tax returns, it is not public, and there is an invasion of privacy when it is made so.

In Morgan, the district court was concerned with the statute that had prohibited the release of the names of child sexual abuse victims. The defendant in that case relied upon a Supreme Court decision in Florida Star v. BJF, 109 S.Ct. 2603 (1988). The Supreme Court had held that the First Amendment would not permit a suit by a rape victim against a newspaper which had published her name from a publicly released police report. Essentially the case held that where a newspaper published truthful information which it has lawfully obtained, damages could be imposed on the newspaper only when narrowly tailored to a state interest of the highest order. As noted earlier, this is precisely the circumstance here. The newspaper would have a heavy burden to demonstrate the unconstitutionality of a Pennsylvania statute providing for juvenile confidentiality. It has been narrowly crafted to protect the bare minimum degree of juvenile confidentiality to effectuate the legitimate rehabilitative and other interests. Essentially, the statute permits publicat n of charges and allegations for serious offenses if the juvenile has previously been convicted of a serious matter. Additionally, the statute permits publication of the first time convictions of serious offenders. Counsel is unaware of any case that has overturned the constitutionality of a statute so narrowly written.

As noted in Barnicki, liability can be imposed even for truthful information lawfully obtained if the state interest is of the highest order. 532 U.S. at 527, 528, supra. Additionally, a motion to dismiss should not be granted if factual development remains to occur on the question of the manner in which the information has

been obtained. Sheetz v. Morning Call, Inc., 747 F. Supp. 1515 (E.D. Pa. 1990). These are two alternative grounds to avoid the defendant's motion to dismiss.

Finally, a Pennsylvania Superior Court decision also makes it clear that a proper cause of action for invasion of privacy has been alleged. Harris by Harris v. Easton Publishing Co., supra, specifically permitted an invasion of privacy case against a newspaper for publishing the identity of welfare recipients contrary to statute. The court recognized that the legislative protection was entitled to be relied upon in establishing the parameters of the tort.

In relevant part, the court stated as follows:

> Clearly, while recipients of assistance do not have an *absolute* right to keep private their addresses and amount of assistance in certain cases, applicants have a legitimate basis for believing that the personal or confidential information revealed to the Department as part of their applications for assistance will not subsequently appear in their local newspaper for all to read. This belief is supported by language found in McMullen v. Wohlgemuth, 453 Pa. 147, 165, 308 A.2d 888, 897 (1973), appeal dismissed, 415 U.S. 970, 94 S. Ct. 1547, 39 L.Ed.2d 863 (1974).
>
> > The statutory ban against disclosing the names of public assistance recipients is a clear recognition and directive by the Legislature that the privacy of the recipient is a fundamental need worthy of protection. This Court is bound to give great deference to this sound legislative judgment. The statutory limitation imposed on appellee's asserted First Amendment right to compel the

> disclosure of those receiving assistance is no greater than necessary to protect the substantial governmental and individual interest involved. (citations omitted)(emphasis added).

It is noted that in Harris, the information had been provided to the newspapers by means of a press release. Despite this, the invasion of privacy count was permitted to proceed against the media defendant.

Under the circumstances, it was legal error for the lower court to conclude that a first offender juvenile arrest record deemed confidential by the state legislature is nonetheless a matter of "legitimate public concern" for purposes of determining whether a cause of action exists for invasion of privacy. The district court was bound to give great deference to the sound legislative judgment in favor of a narrowly crafted privacy for a juvenile first-offense arrest record.

This narrowly drawn statute is well within the typical compromise accepted in the balance between freedom of the press and juvenile privacy. See "Press Access to the Juvenile Courtroom: Juvenile Anonymity and the First Amendment" by Stephen Jonas, 17 Columbia Journal of Law and Social Problems, p. 287 (1981-1983).

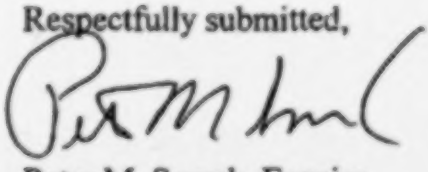
Finally, this Court can give strong national guidance on the need to at least deter the publication from the media and/or newspapers concerning deemed confidentiality concerning juveniles and/or minors. Guidance for the lower courts can be provided on the minimum requirements or acceptance of a balance between freedom of the press and juvenile privacy. Such reasonable guidance would serve to protect both sides on delicate issues concerning "legitimate public concern".

In light of the late Chief Justice's well-documented strong views concerning juvenile confidentiality, an opinion in support of eroding juvenile protections would be part of a meaningful legacy.

CONCLUSION

Petitioners respectfully request that this Court grant the Petition.

Respectfully submitted,



Peter M. Suwak, Esquire

APPENDIX

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COMPLAINT OF JAMES L. BOWLEY 30A

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

July 25, 2005

William K. Suter
Clerk of the Court
(202) 479-3011

Mr. Peter M. Suwak
Pete's Surplus Building
P.O. Box 1
Washington, PA 15301

Re: James L. Bowley
v. City of Uniontown Police Department, et al.
Application No. 05A89

Dear Mr. Suwak:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on July 25, 2005 extended the time to and including September 23, 2005.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Sutter, Clerk
By
Heather Trant
Case Analyst

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-2352

JAMES L. BOWLEY

v.

CITY OF UNIONTOWN POLICE DEPARTMENT; HERALD STANDARD; CITY OF UNIONTOWN, a municipal corporation; OFFICER FRED BALSLEY, individually and in his capacity as a police officer

JAMES L. BOWLEY, a minor, by and through, JAMES C. BOWLEY, guardian ad litem, his natural father,
Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 03-cv--1144)

Argued March 8, 2005

Before NYGAARD, McKEE, and RENDELL,
Circuit Judges.

(Filed: April 26, 2005)

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OPINION OF THE COURT

NYGAARD, Circuit Judge.

This case arises from Appellant James L. Bowley's arrest for allegedly raping a minor while a minor himself, and the subsequent truthful publication of the fact of that arrest by Appellee Uniontown Herald Standard. As a result of the publication, Bowley sued the Herald Standard for a violation of the Pennsylvania statute prohibiting the disclosure of juvenile law enforcement records and for the tort of invasion of privacy. We must now decide whether imposition of civil liability upon the Herald Standard for its actions with regard to Bowley would be consistent with the First Amendment. The District Court held that it would not and granted the Herald Standard's motion to dismiss. Because we agree that under these facts, the First Amendment provides the Herald

Standard with a shield from liability, we will affirm.

I.

The Herald Standard published an article reporting that Bowley, a minor, had been arrested for allegedly raping a seven-year-old girl he was babysitting. In its entirety, the article stated:

> City police arrested James Landon Bowley, 15, of Farmington Sunday on charges he allegedly raped a 7-year-old girl he was babysitting at her Uniontown home Friday evening.
>
> According to police, the girl's mother took her daughter to Uniontown Hospital after the girl complained of injury and bleeding Sunday afternoon.
>
> Bowley turned himself in to police Sunday at 5:45 p.m. and was charged with two counts of rape and one count each of indecent assault, involuntary deviate sexual intercourse and indecent exposure. Chares against Bowley were filed at the Connellsville Juvenile Detention Facility, where he is being held, police said.[1]

(App. at 30a). According to Bowley, the Herald Standard received the information concerning his arrest from Uniontown Police Officer Fred Balsley.

After seeing the report of his arrest in the newspaper, Bowley brought suit in the Court of Common Pleas of Fayette County, Pennsylvania against the Herald Standard,

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[1] Although unclear from the record, it does not appear that Bowley was actually prosecuted.

the City of Uniontown, the City of Uniontown Police Department, and Balsley.[2] He alleged that the release of the fact and details of his arrest to the Herald Standard, and the subsequent publication of that information by the Herald Standard, violated his rights under both state and federal law. Against the Herald Standard, Bowley brought claims for breach of confidentiality in violation of 42 PA. CONS. STAT. §6308, which generally prohibits the disclosure of juvenile law enforcement records, and for the tort of in of invasion of privacy. Against all other Defendants, Bowley brought these state-law claims in addition to a claim under 42 U.S.C. § 1983 for violation of his civil rights.

Because there was a federal claim, Defendants removed the case to the Western District of Pennsylvania. The Herald Standard then filed a motion to dismiss for failure to state a claim. the District Court, relying on the Report and Recommendation from the Magistrate Judge, granted that motion. Because Bowley has since settled with the remaining Defendants and stipulated to a voluntary dismissal of his claims against them, the District Court's grant of the motion to dismiss is a final order, which we have jurisdiction to review pursuant to 28 U.S.C. § 1291.

II.

We exercise plenary review over the grant of a motion to dismiss. *Lorenz v. CSX Corp.*, 1F.3d 1406, 1411 (3d Cir. 1993). We must accept as true all factual allegations iin the complaint and draw all reasonable inferences in the light

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[2] At the time the case was filed, Bowley, born on November 17, 1985, was a minor. Thus, he brought the case through James C. Bowley, his father and guardian *ad litem*.

most favorable to the plaintiff. *Id.* Only if it is certain that no relief could be granted under the facts pleaded may we affirm. *Id.*

III.

As explained, Bowley has stated two claims against the Herald Standard, each stemming from the publication of information concerning his arrest. He first claims a breach of confidentiality in violation of 42 PA. CONS. STATE. § 6303.[3] He also claims a tortuous invasion of his privacy. The Herald Standard argues that the breach of confidentiality claim is not cognizable under Pennsylvania law and that Bowley cannot establish each element of the invasion of privacy claim. It argues in addition, that the First Amendment shields it from civil liability for publishing the article, which contained truthful information received from the police. We agree with the Herald Standard that the First Amendment shields it from liability on these facts.[4]

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[3] Section 6308 of Pennsylvania's Judicial Code provides in relevant:

> The contents of law enforcement records and files concerning a child shall not be disclosed to the public except if the child is 14 or more years of age at the time of the alleged conduct and if any of the following apply:
>
> (i) The child has been adjudicated delinquent by a court....[or]
> (ii) A petition alleging delinquency has been filed by a law enforcement agency...

[4] For that reason we need resolve the questions of state law before us. In particular, we need not decide whether 42 PA. CONS. STAT. §6308 creates a cause of action under Pennsylvania law.

There no doubt exists a tension between the First Amendment right to a free press and an individual's statutory and common law right to privacy, complicated here because the individual in question is a juvenile. It is a tension the Supreme Court has had several occasions to address. See *Florida Star v. B.J.F.*, 491 U.S. 524(1989); *Smith v. Daily Mail Publ'g*, 443 U.S. 97(1979); *Oklahoma Publ'g Co. v. Oklahoma County Dist. Ct..*, 430 U.S. 308 (1977); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975). While the Court has upheld a newspaper's right to publish in each of these cases, it has been careful to decide each upon its discrete facts, *Florida Star*, 491 U.S. at 530, and has declined to hold that publication of truthful information is *per se* protected by the First Amendment, *id.* at 532. Nevertheless, the Court has made clear that as a general matter, "state action to punish the publication of truthful information seldom can satisfy constitutional standards." Daily Mail Publ'g, 443 U.S. at 102. In fact, it has held that "'if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.'" *Florida Star*, 491 U.S. at 533 (quoting *Daily Mail Publ'g*, 443 U.S. at 103). A newspaper, moreover, may be punished consistent with the Constitution only when the punishment is narrowly tailored to serve the purported state interest. *Florida Star*, 491 U.S. at 541. Thus, in order to determine whether the First Amendment permit's the imposition of civil liability upon the Herald Standard for publishing the article concerning Bowley's arrest, we must consider: (A) whether the information was truthful and lawfully obtained; (B) whether the information concerned a matter of public significance; and (C) whether the imposition of liability would be the most narrowly tailored way to serve a state interest of the highest order.

Although the truthfulness of the article is not in dispute, the parties disagree as to whether other aspects of this test have been satisfied. They disagree as to whether the Herald Standard lawfully obtained information concerning Bowley's arrest. They disagree as to whether Bowley's arrest is a matter of public significance. And they disagree, finally, as to whether protecting the anonymity of an arrested juvenile is a need of the "highest order." We address each of these disputes in turn.

A.

Bowley contends that absent discovery, it is unclear whether the Herald Standard lawfully obtained the information in the article. This, he asserts, the case should be remanded. In light of the allegations in the Complaint, however, Bowley can prove no set of facts establishing that the Herald Standard obtained the information unlawfully.

According to the Complaint, Officer Balsley informed the Herald Standard of Bowley's arrest. (App. at 13a). Although Balsley violated Pennsylvania law prohibiting the release of juvenile arrest records by doing so, *see* 42 PA. CONS. STATE. § 6308, his unlawful release of the information does not make receipt of that information by the Herald Standard unlawful. Section 6308 prohibits only the *disclosure* of juvenile law enforcement information , not the *receipt* of such information.[5] *See id.* ("The contents of law enforcement records and files concerning a child shall not be

[5] For the purposes of the First Amendment, whether the Herald Standard's subsequent disclosure of the information violated section 6308 is irrelevant to the question of whether the newspaper lawfully obtained the information it disclosed.

disclosed to the public...."](emphasis added); *cf. Florida Star*, 491 U.S. at 536 ("Even assuming the Constitution permitted a State to proscribe receipt of information, Florida has not taken this step....").

Moreover, the Supreme Court held in *Florida Star* that failure by the police to comply with a Florida statute prohibiting the release of a rape victim's name did not render unlawful a newspaper's resultant receipt of the protected information. 491 U.S. at 536. The Court explained," [n]or does the fact that the Department apparently failed to fulfill its obligation under...[the non-disclosure statute] make the newspaper's ensuing receipt of this information unlawful." Id. the Court reiterated this sentiment in *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001), holding: "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." Similarly in the case before us, Balsley's failure to comply with section 6308 does not render the Herald Standard's subsequent receipt of the information unlawful. Bowley, therefore, cannot prove that the Herald Standard unlawfully obtained the information at issue under the facts alleged.

B.

The fact of Bowley's arrest is a matter of public concern.[6] In *Florida Star*, the Supreme Court held that the

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[6] We recognize, however, that there might be cases where the details of the crime, as opposed to its mere occurrence, would not necessarily be of public concern. *See e.g., Foretich v. Lifetime Cable*, 777 F. Supp. 47, 50(D.D.C. 1991) ("The Court acknowledges that the sexual abuse of children is an issue worthy of public attention, but it does not believe as a matter of law, that the specific facts about the alleged abuse of this one particular child [] as described by the child on the

commission and investigation of violent crimes--in that case like in this one, rape--are matters of "paramount public import." 491 U.S. at 536-37; *accord Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492(1975)("The commission of crime, prosecutions from it, and judicial proceedings arising from the prosecutions...are without question events of legitimate concern to the public...are without question events of legitimate concern to the public...."). The rape of a minor is a crime of violence. Bowley's arrest for allegedly committing that crime is within the realm of legitimate public concern.[7] Although this case is somewhat complicated by the fact that the alleged offender was himself a minor, we think the legitimacy of public concern regarding the rape of minor cannot seriously be doubted, regardless of the age of the accused.

C.

Because the information published by the Herald Standard was truthful, lawfully obtained, and concerning a matter of public significance, the First Amendment shields the Herald Standard from civil liability unless the imposition

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videotape in question are of legitimate public concern.").

[7] Incidentally, it is for this reason that Bowley's claim for invasion of privacy fails. Although the tort of invasion of privacy is actually four distinct torts, only one is presently at issue: publicity given to private life. Under Pennsylvania law, the elements of this tort are: 1)giving publicity; 2) to private facts; 3) of a kind highly offensive to a reasonable person; and 4) *which are not of legitimate concern to the public. Jenkins v. Bolla*, 600 A.2d 1293, 1296 (Pa.Super.Ct. 1992)(emphasis added). As explained in the text, Bowley's arrest is of legitimate public concern. Thus, he cannot establish the elements of his invasion of privacy claim.

of liability is narrowly tailored to serve an interest of the highest order. Even if, as Bowley asserts, protecting the anonymity of an arrested juvenile is an interest of the highest order, under the facts of this case, we hold that subjecting the Herald Standard to civil liability is not the most narrowly tailored means of serving that interest.

The Supreme Court has held that when the government itself inappropriately releases otherwise-confidential information " the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity."[8] *Florida Star*, 491 U.S. at 538. Indeed, when the government has stewardship over confidential information, not releasing the information to the media in the first place will more narrowly serve the interest of preserving confidentiality than will punishing the publication of the information once inappropriately released. *See id.* Because it is alleged in the Complaint, we assume that Balsley, a government employee, provided the Herald Standard with the information in the article, in violation of section 6308's non-disclosure requirement. Accordingly, imposing civil liability upon the Herald Standard is not the most narrowly tailored way to protect Bowley's anonymity. Rather, it would havae been far less drastic for Balsley to have simply not disclosed the information.

D.

A newspaper may not be held liable for its publication

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[8] The anonymity to be protected in that case was that of a rape victim. However, the same rationale applies with equal force to the anonymity of the alleged offender.

of lawfully obtained, truthful information on a matter of public significance unless I posing liability would be the most narrowly tailored means of serving a state interest of the highest order. *Id.* at 541. The information contained in the article published by the Herald Standard was truthful, lawfully obtained, and concerned a matter of public significance. We need not decide whether protecting the anonymity of juvenile offenders is a state interest of the highest order, because when the government is ultimately responsible for the disclosure of information, imposing civil liability upon a newspaper for the subsequent publication of that information is not the most narrowly tailored means of serving any purported interest. Bowley, therefore, cannot seek civil damages against the Herald Standard consistent with the First Amendment. He must instead rest his hopes for restitution "upon the willingness of the government to compensate victims for their loss of privacy" stemming from the government's inappropriate release of confidential information. *Id.* at 538.

IV.

Bowley cannot maintain his action against the Herald Standard consistent with the First Amendment. We will affirm the District Court's grant of the Herald Standard's motion to dismiss.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JAMES L. BOWLEY, a minor,
by and through JAMES C.
BOWLEY, guardian ad litem,
his natural father,

Plaintiff,

v. Civil Action No. 03-1144

CITY OF UNIONTOWN
POLICE DEPT., et al.,

Defendants.

ORDER

AND NOW, this 4th day of December, 2003, after the plaintiff filed a complaint in the above-captioned case, and after defendant Uniontown Herald-Standard moved to dismiss the complaint, and after a Report and Recommendation was issued by the United States Magistrate Judge, and the parties were granted ten days after being served with a copy to file written objections thereto, and upon consideration of the objections filed by the plaintiff, as well as the movant's response to those objections, and after independent review of the pleadings, and the Magistrate Judge's Report and Recommendation, which is adopted as the opinion of this Court,

IT IS ORDERED that the motion to dismiss submitted by defendant Uniontown Herald-Standard (Docket N. 5) is granted.

Joyce Flowers Conti
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYVANIA

JAMES L. BOWLEY, a minor,
by and through JAMES C.
BOWLEY, guardian ad litem,
his natural father,

Plaintiff,

v.

Civil Action N. 03-1144
Judge Conti
Magistrate Judge Mitchell

HERALD STANDARD, CITY OF
UNIONTOWN, a municipal
corporation, CITY OF
UNIONTOWN POLICE
DEPARTMENT, and OFFICER
FRED BALSEY, individually,
and in his capacity as a police officer,

Defendant.

REPORT AND RECOMMENDATION

I. Recommendation

It is respectfully recommended that the motion to dismiss submitted on behalf of Defendant Uniontown Herald-Standard (Docket N. 5) be granted.

II. Report

Plaintiff, James L. Bowley, a minor, by and through James C. Bowley, guardian ad litem, his natural father, brings this action alleging that the November 28, 2000 publication

of a newspaper article reporting that the had been arrested for allegedly raping a seven year-old girl he had been babysitting violated his civil rights and constituted a breach of his confidentiality and invasion of his privacy under state law. Named as defendants are the newspaper that published the article, the Uniontown Herald-Standard ("Herald-Standard"), and the police department of the City of Uniontown, together with the City and Officer Fred Balsey, who allegedly conveyed the information about the arrest to the Herald-Standard.

Presently before this Court for disposition is a motion to dismiss brought by the Herald-Standard. The remaining defendants have filed an answer to the complaint. For the reasons that follow, the motion to dismiss should be granted.

Plaintiff is a minor: he was born on November 17, 1985 and is currently 17 years old. (Compl. ¶5.) On or about November 28, 2000, the Herald-Standard printed an article stating as follows:

> City police arrested James Landon Bowley, 15, of Farmington Sunday on charges he allegedly raped a 7-year-old girl he was babysitting at her Uniontown home Friday evening.
>
> According to police, the girl's mother took her daughter Uniontown Hospital after the girl complained of injury and bleeding Sunday afternoon.
>
> Bowley turned himself in to police Sunday at 5:45 p.m. and was charged with two counts of rape and one count each of indecent assault, involuntary deviate sexual intercourse and indecent exposure. Charges against Bowley were filed at the Connellsville Juvenile Detention Facility, where he is being held, police said.

(Compl.¶ 6 & Ex.A.) Plaintiff alleges that the Herald-Standard obtained the information about his arrest, which was supposed to be kept confidential under state law, from Defendant Officer Fred Balsey, or in the alternative from another member of the Uniontown police department. (Compl.¶¶ 11-12.) He further alleges that the City of Uniontown and the police department failed in their duty to provide appropriate training, instruction and/or follow-up on the confidentiality of juvenile law enforcement records, that they encouraged this conduct by failing to take any disciplinary action despite notice, and that they fully ratified the conduct of the police officers. (Compl.¶13.)

Procedural History

Plaintiff commenced this action on November 28, 2001 by filing a Praecipe for a writ of summons in the Court of Commons Pleas of Fayette County, Pennsylvania. He filed a complaint on July 7, 2003. Count I alleges that the Defendants breached Plaintiff's confidentiality by making the information about the arrest pubic, in violation of 42 Pa.C.S.§ 6308. Count II alleges that the Defendants invaded his privacy. Count III alleges that the municipal defendants and Officer Balsey violated his civil rights by publishing this information and by pursuing a policy, custom or procedure of failing to educate, train or otherwise inform police officers of the basic requirements concerning confidentiality of juvenile records.

On July 29, 2003, Defendants removed the case to this Court on the basis of federal question jurisdiction. On August 8, 2003, the Herald-Standard filed a motion to dismiss the claims alleged against it (County I and II).

Standard of Review

A motion to dismiss must be viewed in the light most favorable to plaintiff and all well-pleaded allegations of the complaint must be accepted as true. Neitzke v. Williams, 490 U.S. 319 (1989); Estelle V. Gamble, 429 U.S. 97 (1976). The motion cannot be granted unless the court is satisfied "that no relief could be granted under any set of facts that could be proved consistent with the allegation." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). See also National Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994). The issue is not whether the plaintiff will prevail at the end but only whether he should be entitled to offer evidence to support his claim. Williams, 490 U.S. at 323; Scheuer v. Rhodes, 416 U.S. 232,236 (1974).

Count I: Breach of Confidentiality

In Count I, Plaintiff alleges that the Defendants breached his confidentiality by making public a law enforcement record of a minor, in violation of 42 Pa.C.S. § 6308. The Herald-Standard moves to dismiss this claim on the grounds that: 1) neither the common law nor the statute provides a private right of action for a juvenile whose records are made public; and 2) the First Amendment precludes sanctioning a newspaper for truthfully reporting information it obtains legally in any event. Because the Herald-Tribune's motion should be granted on First Amendment grounds, the Court can assume without deciding that a private right of action may be maintained under § 6308.

The statute provides in relevant part as follows:

The contents of law enforcement records and

files concerning a child shall not be disclosed to the public except if the child is 14 or more years of age at the time of the alleged conduct and if any of the following apply:

> (I) The child has been adjudicated delinquent by a court as a result of an act or acts which include the elements of rape, kidnapping, murder, robbery, arson, burglary, violation of section 13(a)(30) of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, or other act involving the use of or threat of serious bodily harm.
>
> (ii) A petition alleging delinquency has been filed by a law enforcement agency alleging that the child has committed an act or acts which include the elements of rape, kidnapping, murder, robbery, arson, burglary, violation of section 13(a)(30) of the Controlled Substance, Drug, Device and Cosmetic Act, or other act involving the use of or threat of serious bodily harm and the child previously has been adjudicated delinquent by a court as a result of an act or acts which included the elements of one of such crimes.

42 Pa.C.S. §6308(b)(1) (footnote omitted). Although Plaintiff was 14 years old at the time in question, he was not adjudicated delinquent and therefore the exception to confidentiality would not apply.

The Herald-Standard argues that its article is protected by the First Amendment. The paper notes that the Supreme Court held, in Bartnicki v. Vopper, 532 U.S. 514

(2001), that media defendants who repeatedly broadcast cellular telephone conversations that had been illegally intercepted and taped by an unknown third party and then given to them could not be held liable because their acts (truthful reporting of information given to them) were not removed from First Amendment protection merely because the source of the information had engaged in illegal conduct. The Court noted that its past cases had held that "state action to punish the publication of truthful information seldom can satisfy constitutional standards." Id. at 527 (quoting Smith v. Daily Mail Publishing Co., 443 U.S. 97, 102 (1979)). Based on this principle, the Court had previously "upheld the right of the press to publish information of great public concern obtained from documents stolen by a third party." Id. at 528 (citing New York Times Co. v. United States, 403 U.S. 713 (1971)). The Bartnicki case presented the next step. As the Court phrased the question: "Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?" Id. (citation omitted). The Court answered the question by holding that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." Id. at 535 (footnote omitted).

In this case, the Herald-Standard contends that Plaintiff does not allege that the Herald-Standard obtained the information about his arrest unlawfully (that is, the paper did not break into the police station and steal it), but only that the information should not have been provided to the paper and that it should not have published it pursuant to § 6308. Therefore, as in Bartnicki, the Herald-Standard contends that its action-truthful reporting of information it received-is

protected by the First Amendment, regardless of the actions of the party from whom it obtained the information.

Plaintiff responds that the interest at stake in this case is far more substantial than the release of private cell phone conversations at issue in Bartnicki. He notes that the Court in Bartnicki left open the possibility of sanction even if the newspaper obtained truthful information about a matter of public significance when the state can demonstrate need of the "highest order." Id. at 528, 532. Plaintiff contends that protection of the records of juvenile offenders is a state interest of the highest order, as the Supreme Court recognized in Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979).

In the Daily Mail case, newspapers printed a story revealing the name of a youth who had been arrested for allegedly killing another youth, which they obtained by asking various witnesses, the police and an assistant prosecuting attorney who were at the school. An indictment was brought against the newspapers for violation of a West Virginia statute that made such revelations criminal. The West Virginia Supreme Court of Appeals issued a writ of prohibition, holding the statute unconstitutional. The Supreme Court affirmed.

The Court noted that its prior opinions "all suggest strongly that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." Id. at 103. The interest the state advanced was that of protecting the anonymity of juvenile offenders because publication of the name may encourage further antisocial conduct and may case the juvenile to lose future employment or suffer other consequences for this single offense. The Court observed that the same arguments were at issue in Davis v. Alaska, 415 U.S. 308 (1974), in which the

state prohibited impeaching a prosecution witness on the basis of his juvenile record. The court had concluded that the state's policy had to be subordinated to the defendant's Sixth Amendment right of confrontation. "The important rights created by the First Amendment must be considered along with the rights of defendants guaranteed by the Sixth Amendment. Therefore, the reasoning of Davis that the constitutional right must prevail over the state's interest in protecting juveniles applies with equal force here." Id. at 104 (citation omitted).

Plaintiff cites the Daily Mail case for the proposition that protection of the identity of juvenile offenders is a state interest of "the highest order." However, it was (then) Justice Rehnquuist who stated in his concurrence that he "disagree[d] with the Court that a state statute punishing publication of the identity of a juvenile offender can never serve an interest of the 'highest order.'" Id. at 110 (Rehnquist, J., concurring in the judgment).[1] Thus, the Court did not consider this interest to be one of the highest order. See also Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (father brought suit when a television station broadcast the name of his daughter, who had been raped and killed by six youths, basing the claim on a Georgia statute that made such revelations criminal, but the Supreme Court found the interest in protecting the daughter's anonymity outweighed by the First Amendment interests of the media defendant).

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[1] Justice Rehnquist concurred with the Court's judgment only because he agreed that the statute did not accomplish its stated purpose: it did not apply to broadcast media but only to newspapers and there was no evidence to demonstrate that criminal penalties were necessary to protect the confidentiality of juvenile records. Id. at 104-5. He dissented in Davis v. Alaska, 415 U.S. 303, 321 (1974); Florida Star v. B.J.F., 491 U.S. 524, 542 (1989); and Bartnicki, 532 U.S. at 541.

Plaintiff argues that there are factual issues precluding the granting of a motion to dismiss. He contends that if the Herald-Standard obtained the information unlawfully, including in a manner contrary to statute or otherwise tortuously, its defense would be overcome. However, the Supreme Court cases leave no doubt that the determination of whether the Herald-Standard acted illegally cannot be based on whether it violated § 6308 in obtaining and publishing the information. That argument has already been rejected by the Court in Bartnicki: the media defendants violated federal law by playing the tape of the telephone conversations even though they had reason to know it had been illegally intercepted, but the First Amendment was held to be paramount to the other interests. See also Florida Star v. B.J.F., 491 U.S. 524, 536 (1989) (newspaper did not obtain rape victim's name "unlawfully" merely because state law made police reports which reveal the identity of sexual assault victims not matters of public record and it could not be held civilly liable under Florida statute for broadcasting the name, obtained by trainee who walked into the unrestricted police pressroom and wrote down the full name, which was erroneously included in a police report).

Although the complaint does not contain details about how the paper obtained the information concerning Plaintiff's arrest, it alleges that the information was obtained from Officer Fred Balsey or another police officer. In other words, it does not allege that the paper acted "illegally" as that term is understood in this context. As explained above, the Supreme Court has repeatedly held that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need...of the highest order." Bartnicki, 532 U.S. at 528 (quoting Daily Mail, 443 U.S. at 103). The Court has also held that

protection of the anonymity of juvenile offenders is not a need that rises to the level of the "highest order," Daily Mail, 443 U.S. at 104, and that the commission and investigation of a violent crime which has been reported to authorities is a "matter of paramount public import," Florida Star, 491 U.S. at 537. Therefore, with respect to Count I, the motion to dismiss filed by the Herald-Standard should be granted.

Count II: Invasion of Privacy

In Count II, Plaintiff alleges that the actions of the Defendants constituted an invasion of his privacy. Invasion of privacy is recognized as a tort in Pennsylvania. Vogel v. W.T. Grant, Co., 327 A.2d 133, 136 (Pa. 1974). Following the Restatement (Second) of Torts, the state actually defines four different kinds of invasion of privacy: intrusion upon seclusion, appropriation of name or likeness, publicity given to private life and publicity placing a person in a false light. Restatement (Second) of Torts §§ 652B-E. The most appropriate type with respect to this case would be publicity given to private life:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the others for invasion of his privacy, if the matter published is of a kind that
> (a) would be highly offensive to a reasonable person, and
> (b) is not of legitimate concern to the public.

Restatement (Second) of Torts § 652D. The elements of a claim of invasion of privacy under this section are: 1) giving publicity; 2) to private facts; 3) of a kind highly offensive to a reasonable person; 4) and which are not of legitimate concern

to the public. Jenkins v. Bolla, 600 A.2d 1293, 1296 (Pa. Super.1992)(citation omitted). The Herald-Standard contends that Plaintiff fails to meet two elements: 1) the facts were contained within a public record and are therefore not private; and 2) the matter was one of legitimate concern to the public.

In Jenkins, the operator of a boarding house brought suit against a newspaper for publishing articles referring to his multiple convictions for morals crimes. He argues that the paper made private facts public, but the court disagreed:

> A fact contained within a public record is deemed a public fact. A public record is one necessarily kept in the discharge of duties imposed by law; any writing prepared, used or retained by an agency in pursuance of law or in connection with the transaction of public business is a public record. In this case, Jenkins' convictions were part of the public records of Bucks County. As such, his convictions were facts of legitimate concern to the public and available to the public for inspection.

Id. (citations omitted).

In this case, the records at issue are police arrest records, not convictions. In addition, as noted above, these records are not available to the public for inspection when they concern juveniles. 42 Pa.C.S. § 6308. Plaintiff notes that the Restatement provides that "if the record is not open to public inspection, as in the case of income tax records, it is not public, and there is an invasion of privacy when it is made so." Restatement §652D. comment b. Thus, Plaintiff contends that the Restatement does recognize an invasion of privacy under circumstances where the record is not available to the public. It is unclear whether the arrest record of a juvenile, which is an official record that state law deems to be

confidential, constitutes a public record. However, the Court need not resolve this issue because Plaintiff's arrest was a matter of legitimate public concern.

The Restatement provides that newsworthy items are included within the scope of matters of legitimate public concern. Restatement § 652D, comment d at 388. The Herald-Standard argues that sexual abuse of minor children is a newsworthy item. It cites Morgan by Chambon v. Celender, 780 F. Supp. 307, 310 (W.D. Pa. 1992), in which the court held that a mother could not maintain an invasion of privacy claim against a newspaper and a reporter for publishing an article revealing the name and age of her daughter, a victim of sexual abuse by her father.

Plaintiff responds that, in the Morgan case, the accused individual was the police chief (a public official), who was alleged to have assaulted his own child and the information published by the paper was based on an interview voluntarily given by the child and the mother. The Restatement also provides that members of the family of a public figure may in some cases become public figures themselves. Restatement § 652D, comment i. In this case, by contrast, Plaintiff contends that he is not a public figure and that no one consented to have the Herald-Standard publish this information. However, these distinctions do not address whether his arrest was a matter of legitimate public concern.

Plaintiff cites Harris by Harris v. Easton Publishing Co., 483 A.2d 1377 (Pa. Super. 1984). In that case, a woman brought suit under § 652D when a newspaper published information concerning her and her family that she had provided to the Department of Public Welfare in order to receive benefits. The Department altered some of the facts in order to disguise the plaintiff's identity and then sent the fictionalized account of her inquiry to various newspapers for

inclusion in a public service column regularly provided by the Department to create more public understanding of its operations, policies and available services. The trial court entered summary judgment for the defendants, but the Superior Court reversed. With respect to the element of demonstrating that the publication of private facts was not of legitimate public concern, the court stated as follows:

> There can be no doubt as to the benefits inherent in the publication of information to aid those eligible for public assistance who encounter difficulties in applying for assistance or continuing their receipt thereof. However, there is no legitimate public concern in giving publicity to the actual circumstances of a person's application for assistance where intimate personal facts are revealed (1) in such a way as to imply that those facts are true and (2) where the personal facts are unnecessary to aid those interested in receiving advice in their applications for assistance.

Id. at 1387. The court concluded that:

> the facts publicized in the instant case were of the type which were designed to be protected. Their dissemination to the general public was highly offensive, particularly in light of the statutory protection afforded to them pursuant to the Public Welfare Code. The facts publicized were not of legitimate concern to the public. No other exception is applicable to plaintiffs, as they were not public figures, nor were the facts made public prior to this publication. We therefore hold that because genuine issues of material fact are present, summary judgment was inappropriate.

Id. at 1388.

However, this case does not concern the revelation of intimate details about a welfare recipient's private life, a matter that the court determined was not of legitimate concern to the public. Rather, it concerns the arrest of an individual charged with sexually assaulting a minor. The Supreme Court has held that this information concerns "'a matter of public significance,' in the sense in which the Daily Mail synthesis of prior cases used that term," Florida Star, 491 U.S. at 536 (citing Daily Mail, 443 U.S. at 103). See also Jones v. Taibbi, 512 N.E.2d 260 (Mass. 1987) (plaintiff arrest was a matter of legitimate public concern, as determined as a matter of law).

In addition, Plaintiff argues that the Supreme Court has recognized the reasonable privacy expectation of an individual in not having his "rap sheet" made public. United States Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989). In that case, the Supreme Court determined that the FBI did not have to comply with Freedom of Information Act (FOIA) requests for the rap sheets of an individual whose family business had been associated with organized crime. The Court held that the rap sheets fell within a FOIA exemption excluding from disclosure materials compiled for law enforcement purposes "to the extent that the production of such [materials]...could reasonably be expected to constitute an unwarranted invasion of personal privacy." The individual's interest in the nondisclosure of the records was the sort of personal privacy interest that Congress intended to protect with this exemption and the disclosure of the rap sheet was not "warranted" because it did not fall within the statutory purpose of shedding light on the FBI's own conduct.

However, as the Court noted "[t]he question of the statutory meaning of privacy under the FOIA is, of course,

not the same as the question whether a tort action might lie for invasion of privacy or the question whether an individual's interest in privacy is protected by the Constitution." Id. at 762 n.13. Thus, the Reporters Committee case does not address the issue of whether the arrest of a juvenile for sexually assaulting another juvenile is a matter of public significance such that no claim for giving publicity to private life may be maintained under state law. By contrast, the cases cited above demonstrate that such information is of public significance. Plaintiff has cited no case that holds otherwise.

Finally, Plaintiff argues that this issue cannot be decided on a motion to dismiss, citing Scheetz v. The Morning Call, Inc., 747 F. Supp. 1515 (E.D. Pa. 1990). In that case, the district court granted summary judgment for a newspaper and its reporter who revealed information from a confidential police report. The court concluded that the plaintiffs had alleged a prima facie violation of 42 U.S.C. § 1983, but that the First Amendment rights of the defendants outweighed their privacy grounds: it concluded that the plaintiffs failed to allege a violation of a protected privacy interest. Scheetz v. The Morning Call, Inc., 946 F.2d 202 (3d Cir. 1991). The court noted that when Rosann Scheetz reported her husband's physical abuse of her to the police, she "could not reasonably expect the information to remain private. The police could have brought charges without her concurrence, at which point all the information would have wound up on the public record, where it would have been non-confidential." Id. at 207.

Although the case was decided on a motion for summary judgment, the court's opinion did not state that it depended on the development of the record. Plaintiff has not explained how additional discovery, time and expense will change matters given the clear line of decisions

demonstrating that his arrest was a matter of legitimate public concern. Therefore, with respect to Count II, the Herald-Standard's motion to dismiss should be granted.

For these reasons, it is recommended that the motion to dismiss submitted on behalf of Defendant Herald Standard (Docket No. 5) be granted.

Within ten (10) days of being served with a copy, any party may serve and file written objections to this Report and Recommendation. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights.

Respectfully submitted,

_____

Robert C. Mitchell
United States Magistrate Judge

Dated: September 24, 2003

cc: Honorable Joy Flowers Conti
United States District Judge
Peter M. Suwak
Edmond R. Joyal, Jr.
Charles Kelly

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY, PENNSYLVANIA
CIVIL DIVISION

JAMES L. BOWLEY, a minor, by and through JAMES C. BOWLEY, guardian ad litem, his natural father,

Plaintiff,

v.

HERALD STANDARD, CITY OF UNIONTOWN, a municipal corporation, CITY OF UNIONTOWN POLICE DEPARTMENT, and OFFICER FRED BALSEY, individually, and in his capacity as a police officer,

Defendant.

G.D. 2555 of 2001

COMPLAINT

COMES NOW, the Plaintiff, James L. Bowley, by and through her Counsel, Peter M. Suwak, Esquire, and brings the following causes of action:

1. The Plaintiff James L. Bowley is a minor individual, presently residing at #5 Fairview Avenue, Edison, NJ 08817. James C. Bowley is his natural father and guardian ad litem with the same address.

2. The Defendant Herald Standard is a newspaper

which publishes in southwestern Pennsylvania and in the Fayette County, Pennsylvania. The newspaper has a local business office at 8-18 E. Church Street, Uniontown PA 15401.

3. The Defendant City of Uniontown is a duly constituted municipal body with an official address of 20 N. Gallatin Avenue, Uniontown PA 15401. The Defendant City of Uniontown Police Department shares the same address.

4. Defendant Officer Fred Balsley is an adult individual who is a police officer in the City of Uniontown Police Department with an official address of 20 N. Gallatin Avenue, Uniontown PA 15401.

5. Plaintiff James L. Bowley is presently 17 years old and was born on November 17, 1985.

6. On or about November 28, 2000, Defendant Herald Standard ran an article in their newspaper stating that Plaintiff had been arrested on November 26, 2000 for allegedly raping a 7 year old girl he had been babysitting. The story was based upon information the newspaper had received from the Defendant Police Department, and in particular, from Defendant Balsley. A copy of said article is attached hereto as Exhibit A and made a part hereof.

7. Under Pennsylvania law, information concerning alleged criminal activities and in particular, the contents of law enforcement records and files, concerning a child shall not be disclosed to the public unless the child is over 14 and has been adjudicated delinquent by a court for certain specified acts. See 42 Pa.S. §6308. At the time of the publication, Plaintiff Bowley had not been adjudicated

delinquent, and he has never been adjudicated delinquent for the acts specified by the statute.

8. As a result of this, plaintiff has suffered extreme humiliation, mental anguish embarrassment, fear of social ostracism, and other severe mental distress. These injuries have caused the plaintiff great pain and suffering, preventing him from attending to his usual duties and activities; all of which may be permanent in nature.

I. Count I: Breach of Confidentiality

9. The averments of Paragraphs 1 through 8 are here incorporated as though fully set forth at length.

10. Defendants had a duty under Pennsylvania law to keep information concerning allegations of criminal acts of a minor child such as Plaintiff completely confidential.

10. By disclosing that plaintiff had arrested for allegedly committing a serious, highly prejudicial and odious act to the public to and in a public newspaper, Defendants breached this obligation, particularly since both the name of the plaintiff and his age were disclosed in the newspaper article.

11. Specifically, Defendant Balsley breached the plaintiff's confidentiality by willfully and unlawfully, or alternatively, unnecessarily, recklessly and in conscious disregard of the plaintiff's rights, telling a third person, to wit, the newspaper the name of plaintiff and his alleged criminal act, knowing that it was likely the newspaper would publish the information to the public.

12. Alternatively, another member of the City of Uniontown breached the plaintiff's confidentiality by willfully and unlawfully, or alternatively, unnecessarily, recklessly and in conscious disregard of the plaintiff's rights, telling a third person, to wit, the newspaper the name of plaintiff and his alleged criminal act, knowing that it was likely the newspaper would publish the information to the public.

13. Defendants City of Uniontown, its Police Department and the individual defendant officer have established, developed, ratified, approved or otherwise encouraged by and through its agents and/or employees, the following patterns of conduct creating policies or other de facto usages, customs, practices, and procedures, including the following:

a. Defendants City and Department have pursued a custom, policy, and/or procedure of failing to provide appropriate training, instruction and/or follow-up on the confidentiality of juvenile records.

b. Defendants City and Department encouraged the instant conduct by failing to take any disciplinary action whatsoever despite notice. As a result of these failures, Defendant Township has failed to protect the public, including Plaintiff, as outlined.

c. Defendant City and Department fully ratified the conduct of its police officers.

14. Defendant Herald Standard breached the plaintiff's confidentiality by willfully and unlawfully, or alternatively, unnecessarily, recklessly and in conscious

disregard of the plaintiff's rights, publishing an article in its newspaper telling the public the name of plaintiff and his alleged criminal act.

15. The person or persons to whom the information was divulged had no legitimate interest in such information and hence the divulging of the information was not privileged.

16. As a result thereof, the plaintiff was damaged as set forth in paragraph 8 above. In view of the outrageous nature of the conduct alleged, punitive damages are appropriate.

WHEREFORE, plaintiff demands judgment in his favor and against the defendants, jointly and severally, in an amount in excess of $25,000.00.

II. Count II: Invasion of Privacy

17. The averments of Paragraphs 1 through 16 are here incorporated as though fully set forth at length.

18. The actions of the defendants aforesaid constitute an invasion of the plaintiff's privacy as set forth in the United States Constitution, the Constitution of the Commonwealth of Pennsylvania and the common law right to privacy.

19. As a result thereof, the plaintiff has been damaged as set forth in paragraph 8 above. In view of the outrageous nature of the conduct alleged, punitive damages are appropriate.

WHEREFORE, plaintiff demands judgment in his

favor and against the defendants, jointly and severally, in an amount in excess of $25,000.00.

Count III: Civil Rights Violations
(v. the municipal Defendants and police officer)

20. The averments of paragraphs 1 through 19 above are here incorporated as though fully set forth at length.

21. The actions of the Defendants City of Uniontown, City of Uniontown Police Department and Officer Balsley, violated the rights, privileges and immunities secured by the Constitution of the United States of the plaintiff in that his privacy rights were violated and infringed. Such conduct was ratified and/or encouraged by the decision-makers for the City of Uniontown and its Police Department, in that no disciplinary action was taken for this and/or other similar acts by its police officers. Additionally and/or alternatively, the municipality has pursued a policy, custom, or procedure of failing to properly educate, train or otherwise inform its police officers of the basic requirements of law concerning confidentiality of juvenile records.

22. These actions have served to deprive the Plaintiff of his civil rights, as previously outlined, under color of law, and hence violate the United States Constitution and are actionable under 42 U.S.C. §1983.

23. As a result of the aforementioned, Plaintiff has been damaged as previously outlined in paragraph 8 above. In addition to the listed damages, including punitive damages, he is also entitled to counsel fees and costs for this action under 42 U.S.C. §1988.

WHEREFORE, this Honorable Court is respectfully requested to enter judgment against defendants, jointly and severally, and in favor of Plaintiff in an amount in excess of $25,000.00. JURY TRIAL DEMANDED.

Respectfully submitted,

By: _____

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